STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION AND ITS TAHOE-TRUCKEE CHAPTER NO. 383,	)	
Charging Party,	)	Case No. S-CE-1006
v.	)	PERB Decision No. 668
TAHOE-TRUCKEE UNIFIED SCHOOL DISTRICT,	)	May 27, 1988
Respondent.	)	

Appearances: Christopher E. Niehaus, Field Representative, for the California School Employees Association and its Tahoe-Truckee Chapter No. 383; Douglas A. Lewis, Attorney, for the Tahoe-Truckee Unified School District.

Before Hesse, Chairperson; Porter, Craib and Shank, Members.

DECISION

HESSE, Chairperson: The Tahoe-Truckee Unified School District (District) appeals the attached proposed decision of a Public Employment Relations Board (PERB or Board) administrative law judge (ALJ) who found that the District violated section 3543.5(a), (b), and (c) of the Educational Employment Relations Act (EERA or Act).[1] The ALJ determined

[1]EERA is codified at Government Code section 3540 et seq. Section 3543.5 provides, in pertinent part, as follows:

> It shall be unlawful for a public school employer to:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to

that the District impermissibly contracted to have certain bargaining unit printing and repair work performed by private business entities, rather than have this work performed by the bargaining unit employee in the repairman/printer position.

For the reasons set forth in the discussion which follows, the Board reverses in part and affirms in part those portions of the proposed decision in which the ALJ determined that the District violated EERA.

FACTS

No exceptions have been filed to the ALJ's findings of fact. Upon a review of the evidentiary record in this case, we find the ALJ's statement of facts to be free of prejudicial error and therefore adopt those findings as those of the Board. For convenience, a summary of the relevant facts follows.

The Tahoe-Truckee Unified School District Board of Trustees issued a resolution on August 14, 1985, to abolish the repairman/printer position and certain other bargaining unit jobs, effective September 13, 1985. On August 22, 1985, the California School Employees Association and its Tahoe-Truckee

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> discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

Chapter No. 383 (CSEA or Association) demanded that the District negotiate the effects of these layoffs. A tentative agreement was reached between negotiators for the District and CSEA on September 13, whereby the parties agreed that in lieu of elimination of the repairman/printer position, it would be reduced to a half-time position (20 hrs. per week). This tentative agreement also contained provisions which banned contracting out unit work, prevented any increased usage of volunteers or students, and prohibited any speedup of work for the duration of the layoffs.

At a meeting on October 9, 1985, the school board voted to lay off additional bargaining unit staff. On November 1, 1985, the District and Association negotiators agreed that the September tentative agreement would apply to these layoffs as well.

However, prior to school board adoption of the tentative agreement, the composition of the school board and the top District administrative staff changed. On November 13, 1985, the new board specifically declined to ratify the agreement due to concerns about the subcontracting restrictions.

On January 22, 1986, a revised tentative agreement was executed by the parties. Where the first agreement contained an absolute prohibition on subcontracting unit work, the new agreement contained language prohibiting contracting out "unless such contracted work had been negotiated with the bargaining unit." The January 22 agreement was subsequently adopted by the board.

In April 1986, CSEA communicated to the District its suspicions that unit work involving printing and audio-visual repair was impermissibly being contracted out. On April 17, 1986, the District acknowledged that a single printing project was improperly subcontracted.

CSEA, however, remained convinced that other incidents of contracting out were occurring and, on June 25, 1986, requested that the District supply records of printing requisitions, purchase orders, and audio-visual repair bills dating back to September 30, 1985. The District complied with this request on July 9, 1986. CSEA filed its unfair practice charge on July 8, 1986, wherein it alleged the District repudiated the agreement by engaging in specific incidents since January 1986 of unlawfully contracting out unit work customarily performed by the repairman/printer position.

DISCUSSION

We hold that the ALJ incorrectly concluded that the District unlawfully contracted out bargaining unit work between September 1985 and January 1986,[2] in violation of EERA section 3543.5(c) and, derivatively, (a) and (b). We find a

[2]The ALJ identified the following incidents of unlawful contracting out prior to January 22, 1986:

> The printing of letterheads on 9/19/85, 10/10/85, 11/1/85, 11/9/85; the printing of index cards and forms on 10/10/85, 10/17/85, 11/14/85; audio visual repair work on 10/25/85, 11/5/85, 11/16/85, and 11/18/85.

significant distinction between those incidents occurring before January 1986, as compared to the incidents occurring afterwards.[3]

The ALJ principally relied upon a joint exhibit, introduced without objection by either party, containing numerous purchase orders, requisitions, and repair bills dated from September 1985 through June 1986. The ALJ also relied upon the testimony of the repairman/printer in concluding that work traditionally performed by the bargaining unit, as defined by past practice, had been unilaterally contracted out.

While we are in agreement with the ALJ's analysis that "unit work" constituted all printing and audio/visual repairs within the limits of the printing equipment and personal skills of the repairman/printer, we reject his conclusion that incidents of subcontracting prior to January 22, 1986, were violations of EERA because none of those instances were either alleged or fully litigated throughout these proceedings and, therefore, cannot be sustained as violations of the Act.

Unalleged Violations

It appears from the record that the Association knew or had reason to know of the pre-January incidents at the time it

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[3]We affirm the ALJ's determination that three separate incidents of subcontracting occurring after January 22, 1986, were unlawful. Those projects improperly subcontracted after January 22, 1986, include printing of letterhead cards on February 14, 1986, a course description handbook on February 23, 1986, and printing of a parent newsletter on March 20, 1986.

filed its charge on July 8, 1986. However, at no time prior to the instant appeal did the Association argue or suggest either in its case-in-chief or in any of its pleadings that these incidents should be litigated or the complaint amended. Thus, these occurrences can only be sustained as Unalleged violations which, of necessity, must have been fully litigated.

This Board established the principle that Unalleged violations may be entertained by it only when adequate notice and the opportunity to defend has been provided the respondent, and where such acts are intimately related to the subject matter of the complaint, are part of the same course of conduct, have been fully litigated, and the parties have had the opportunity to examine and be cross-examined on the issue. (Santa Clara Unified School District (1979) PERB Decision No. 104 and Eureka City School District (1985) PERB Decision No. 481.) The failure to meet any of the above-listed requirements will prevent the Board from considering Unalleged conduct as violative of the Act. In the instant case, these standards have not been met.

The documents outlining the District's subcontracting practice since September 1985 were introduced for the limited purpose of establishing the District's past subcontracting practice and to identify what constituted unit work prior to January 22, 1986. The following discussion at the hearing regarding these documents is instructive:

[District Counsel] LEWIS: It's my understanding that our agreements on January 22, 1986, if we're going to discuss these it would seem like we should only be discussing those that occurred after January 26 [sic]. Like the first one is 9/19/85 which is before any of this happened.

ALJ: Why do we have it in here?

[Union Counsel] NIEHAUS: Well, it's a request that I made to the District, Joint No. IX, I made a request —

ALJ: No. IX —

NIEHAUS: In Joint Exhibit No. IX is a copy of the request for information that I made . . . the District . . . responded by sending me this packet of information . . . .

ALJ: All right. Let's look at the one that has the number zero on it.

LEWIS: Well, but aren't we still looking at the January 22 agreement? I mean, that's when it was prohibited.

ALJ: Well, yes, but it's going to be relevant either way. If this is, if number zero shows printing that was done when she was still employed, then it shows that there was a past practice of this kind of printing going out. If it shows printing that's come after that, but then it shows that this work went out, so either way it's going to be relevant, either to help your case or to help his case.

LEWIS: Okay. It's in evidence.

We note that the ALJ did not differentiate between the relevance of these documents for purposes of establishing past practice as distinct from allegations of unlawful subcontracting, which, if true, could result in findings against the District. We also find persuasive the fact that

the Association at no time attempted to amend the complaint to include these allegations. Thus, we conclude that the District lacked any notice that these incidents were offered as allegations of unlawful conduct. Further, given the lack of notice and the record as a whole, we are unable to conclude that the Unalleged violations were fully litigated.

This determination is consistent with the National Labor Relations Board (NLRB) precedent requiring adequate notice and an opportunity to defend against Unalleged violations as a fundamental prerequisite for determining if a matter has been fully litigated. (American Motors Corp. (1974) 214 NLRB 455 [87 LRRM 1393]; Hadbar, Div. of Pur 0 Sil, Inc. (1974) 211 NLRB 333 [86 LRRM 1437]; and Kingwood Mining Co. (1974) 210 NLRB 844 [86 LRRM 1203].) Moreover, the NLRB has consistently rejected administrative law judge decisions where notice was not provided that evidence of Unalleged conduct might constitute the basis for independent violations. (P & C Food Markets (1987) 282 NLRB No. 122 [124 LRRM 1174]; Middletown Hospital Assoc. (1986) 282 NLRB No. 79 [124 LRRM 1260]; Lone Star Industries, Inc. (1986) 279 NLRB No. 78 [122 LRRM 1162]; and Glasgow Industries, Inc. (1974) 210 NLRB 121 [86 LRRM 1219].)[4]

[4]In Santa Clara, supra, this Board suggested a distinction existed in NLRB cases for applying the notice requirement only in circumstances where the Unalleged violation is distinctly separate from the charged unfair practice. However, the above-cited cases contradict this rationale. Accordingly, we hold that notice is required in all circumstances.

Fundamental due process also requires that the respondent be given a "meaningful opportunity to meet the complaint." (NLRB v. Complas Industries (1983) 714 Ed.2d 279 at 283 [114 LRRM 2028]; see also NLRB v. MacKay Radio & Telegraph Co. (1938) 304 US 333, 350 [2 LRRM 610].) This is especially true where, as here, the allegations are outside the statutory time frames.[5]

In addition, we find that the ALJ erred in adjudicating allegations never raised by the parties. That the ALJ and this Board are constrained from resolving, sua sponte, issues neither set forth in the complaint nor fully litigated after proper notice and an opportunity to defend was recently reiterated by the California Court of Appeal in J. R. Norton Co. v. ALRB (1987) 192 Cal.App.3d 874. The court in Norton rejected the ALRB's determination that an employer unlawfully refused to hire an entire seasonal work crew when evidence was only received and litigated as to three individual employees from the crew. The court, in pertinent part, reasoned as follows:

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[5]Rockingham Machine-Lunex Co. v. NLRB (1981) 665 Fed.2d 303, 81 NLRB 1327 [108 LRRM 3228]. In Rockingham, the ALJ's reliance on evidence of an employee's discharge outside the statutory time period, admitted solely for "background" purposes was determined by the NLRB to improperly form the bases for finding an independent violation. (See also Cedarcrest, Inc. (1979) 246 NLRB 131 [102 LRRM 1692].)

For the reasons which follow, it is unnecessary to determine whether the Unalleged incidents in the instant matter were also untimely.

. . . . . .

> The Board's broad finding applying the refusal to hire all of the Crew W was made without notice to Norton of the substituted charge and the opportunity to defend against it . . . It is difficult, if not impossible, to conclude a failure or refusal to rehire the entire Crew W was fully litigated.

The Court in Norton further overturned the ALRB's conclusion on the basis that a denial of fundamental due process would result if Unalleged and unlitigated matters were resolved without notice and stated:

> The province of the Board is to resolve, not to find, issues. Where evidence is introduced on one issue set by the pleadings, its introduction cannot be regarded as authorizing the determination of some other issue not presented by the pleadings. (See Crescent Lumber Co. v. Larson (1913) 166 Cal. 168, 171; Marvin v. Marvin (1981) 122 Cal.App.3d 871, 875.) Because Norton was not advised that failure to rehire was the activity it needed to defend against, it is not surprising the Board found Norton failed to present evidence justifying a failure to rehire. Consequently Norton had no opportunity to gather evidence or prepare legal arguments refuting the occurrence of such violations. Fundamental fairness includes both the right to adequate notice and the right to defend against charged violations. The lack of notice runs contrary to elementary constitutional principles of procedural due process which requires the Board's findings be set aside. (See Sunnyside Nurseries Inc. v. Agricultural Labor Relations Bd. (1979) 93 Cal.App.3d 922, 933.)

We observe these principles in this case.

The Timeliness of Pre-January 22 Incidents

The ALJ concluded that although the pre-January incidents occurred outside the six-month statutory period, the District waived any opportunity to raise this as a defense, citing Walnut Valley Unified School District (1983) PERB Decision No. 289.

The District in its exceptions urges the Board to reverse the ALJ's determination that it waived its right to assert the statute of limitation as an affirmative defense and additionally requests the Board to dismiss those Unalleged incidents of subcontracting prior to January 22, 1986, as untimely.

We hold that, irrespective of whether the six-month statute of limitations was properly raised by the District or waived pursuant to Walnut Valley, our determination that the pre-January 22 incidents were not fully litigated in accord with the standards set forth in Santa Clara, supra, is dispositive. We expressly decline to adopt the ALJ's reasoning that the District's failure to assert the statute of limitation until the instant appeal constituted a waiver of the opportunity to do so under EERA section 3541.5(a)(l)[6] and

[6]EERA section 3541.5 reads, in pertinent part, as follows:

. . . . . .

(a) Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not do either of the following:

Walnut Valley, supra.

Moreover, we conclude that the District lacked notice that the Unalleged incidents could constitute violations and was therefore precluded from raising the statutory time limits as a defense until after the proposed decision was issued. A party cannot fairly be charged with an obligation to assert affirmative defenses to allegations never brought to its attention. Thus, there can be no waiver on these facts. Accordingly, the ALJ's reasoning and application of Walnut Valley was inapposite.[7]

Post January 22, 1986 Incidents

We find those incidents of subcontracting subsequent to January 22, 1986, found by the ALJ to be in violation of EERA section 3543.5(c) and, derivatively (b), to be supported by the record and accordingly affirm that portion of the proposed decision. (See fn. 3 at p. 5.) These incidents represented a unilateral change from the District's past subcontracting practice and a violation of the party's agreement which had a direct effect upon the terms and conditions of the employment of the affected bargaining unit member. (Oak Grove School District

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> (1) issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge. . . .

[7]The Board's decision in this case not to consider the Walnut Valley standards does not explicitly or implicitly constitute agreement with the reasoning contained therein. We leave for another day the correctness of Walnut Valley.

(1985) PERB Decision No. 503; Grant Joint Union High School District (1982) PERB Decision No. 196.) While the District's unilateral change in subcontracting practices necessarily denied the Association its statutory right to bargain on behalf of unit members, we find no evidence that individual employee rights as such were abrogated. Therefore, we disaffirm the ALJ's finding of a derivative section 3543.5(a) violation.

REMEDY

Consistent with our remedial authority, we find that Renee Stone, the District's only repairman/printer, shall be made whole for wages and any other benefits lost when work ordinarily performed by her was contracted out. The lost compensation shall be calculated by applying the appropriate hourly rate to the hours she would have worked had the three improperly subcontracted incidents not occurred.

ORDER

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, and pursuant to section 3541.5(c) of the Educational Employment Relations Act, it is hereby ORDERED that the Tahoe-Truckee Unified School District and its representative shall:

1. CEASE AND DESIST FROM:

A. Unilaterally transferring work out of the classified bargaining unit by subcontracting to outside printers and electronic repair shops work formerly performed by a member of the unit.

B. Denying to the California School Employees Association and its Tahoe-Truckee Chapter No. 383 rights guaranteed by the Educational Employment Relations Act, including the right to represent its members.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

A. Reimburse Renee Stone for all wages and other benefits lost because of the District's decision to subcontract the printing of letterhead on February 14, 1986, course description handbook on February 23, 1986, and a parent newsletter on or about March 20, 1986. The amount due to Ms. Stone shall be augmented by interest at the rate of ten percent per annum dating from the first pay period after the subcontracting of each job.

B. Within thirty-five (35) days following the date this Decision is no longer subject to reconsideration, post at all work locations where notices to classified employees are customarily posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that the District will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced, or covered by any other material.

C. Written notification of the actions taken to comply with this Order shall be made to the Sacramento Regional Director of the Public Employment Relations Board in accord with the Director's instructions.

It is further ORDERED that all other allegations in Case No. S-CE-1006 are hereby DISMISSED.

Members Craib and Shank joined in this Decision.

Member Porter's dissent begins on page 16.

Porter, Member, dissenting: I must respectfully disagree with my colleagues' conclusion that the respondent District unlawfully changed the policy that printing work, which was bargaining unit work, would not be contracted out. While the record shows that some unintentional and unrelated violations of the agreement occurred in connection with printing work, none of these violations had a generalized effect or continuing impact upon the bargaining unit employees, nor do the violations individually or together, by their nature or by the circumstances surrounding them evidence a change in policy as to such printing work.

The Legislature has expressly withheld from this Board the authority to enforce agreements between the parties and/or to remedy alleged violations of such agreements unless the alleged violations also constitute an unfair practice under EERA. (Gov. Code, sec. 3541.5, subd. (b).[1]) Reasonably implied from the terms of the statute — and borne out in the prior decisions of this Board — is that violations of the parties' agreement are not automatically, per se, unfair practices under EERA. As set

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[1]Subdivision(b) of EERA section 3541.5 prescribes:

> The board shall not have authority to enforce agreements between the parties, and shall not issue a complaint on any charge based on alleged violation of such an agreement that would not also constitute an unfair practice under this chapter.

forth by this Board in Grant Joint Union High School District (1982) PERB Decision No. 196, pages 2-12, footnotes omitted, emphasis added except as noted:

> The Association alleges that the District breached three separate terms of the parties' collective agreement. Such conduct, it argues, constitutes a unilateral modification of the agreement and a repudiation of a negotiable subject matter in violation of subsection 3543.5(c).
>
> . . . . . .
>
> Subsection 3541.5(b) states:
>
> > The board shall not have authority to enforce agreements between the parties, and shall not issue a complaint on any charge based on alleged violation of such an agreement that would not also constitute an unfair practice under this chapter. [Emphasis in original.]
>
> . . . . . .
>
> The Act is designed to foster the negotiation process. Such a policy is undermined when one party to an agreement changes or modifies its terms without the consent of the other party. PERB is concerned, therefore, with a unilateral change in established policy which represents a conscious or apparent reversal of a previous understanding, whether the latter is embodied in a contract or evident from the parties' past practice. [Citations.]
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> . . . . . .
>
> This is not to say that every breach of contract also violates the Act. Such a breach must amount to a change of policy, not merely a default in a contractual obligation, before it constitutes a violation of the duty to bargain. This distinction is crucial. A change of policy

has, by definition, a generalized effect or continuing impact upon the terms and conditions of employment of bargaining unit members. On the other hand, when an employer unilaterally breaches an agreement without instituting a new policy of general application or continuing effect, its conduct, though remediable through the courts or arbitration, does not violate the Act. The evil of the employer's conduct, therefore, is not the breaching of the" contract per se, but the altering of an established policy mutually agreed upon by the parties during the negotiation process. [Citations.] By unilaterally altering or reversing a negotiated policy, the employer effectively repudiates the agreement. [Citation.]

. . . A prima facie case will be successfully stated if the Association's complaint alleges facts sufficient to show: (1) that the District breached or otherwise altered the parties' written agreement . . .; and (2) that those breaches amount to a change of policy; that is, that they had a generalized affect or continuing impact upon the terms and conditions of bargaining unit members.

. . . . . .

With respect to the transfer issue, the Association alleges that the District's decision to prohibit previously assigned teachers from applying for vacancies directly conflicted with section 1.2 of the negotiated side agreement, which specifies that vacancies 'shall be open to all bargaining unit members.' Since, by its terms, the need-not-apply notice was directed to all employees who, when vacancies arose, had already been assigned to a position for the 1980-81 academic year, the District's conduct would, by necessity, have a continuing impact on the bargaining unit. Therefore, its conduct, if true, would constitute the adoption of a new policy of general application in conflict with the parties' negotiated agreement. [Citations.]

As further articulated by this Board in Oak Grove School District (1985) PERB Decision No. 503, page 7, emphasis added:

> To show that a unilateral change has occurred, the charging party logically must first prove what the employer's prevailing practice or policy was as to the working condition at issue. Having established this 'status quo ante,' the charging party must then show that the employer has, without first providing an opportunity to negotiate, departed from that prevailing policy or practice in a way which evidences the adoption of a new policy having a generalized effect or continuing impact upon the bargaining unit members. Grant Joint Union High School District (1982) PERB Decision No. 196.

Thus, in analyzing whether an employer's violation(s) of an agreement also constitute an unlawful unilateral change in policy in violation of subdivision (c) of EERA section 3543.5, it is incumbent upon us to examine the nature of the individual violation(s) as to whether it is one having a generalized effect or continuing impact upon the bargaining unit members, as well as whether the circumstances surrounding the violation(s) demonstrate that the employer has, in fact, repudiated the policy.[2] (Grant Joint Union High School District (1982) PERB Decision No. 196, pp. 2-12; Oak Grove School District (1985)

[2]In a given case, a violation may not, in itself, have a generalized effect or continuing impact upon the bargaining unit members. However, the statements and actions of the employer in connection with the violation may demonstrate that the employer has, in fact, intentionally repudiated the established policy and has embarked on a new and different policy which does or will affect bargaining unit members.

PERB Decision No. 503, p. 7; Eureka City School District (1985) PERB Decision No. 528, pp. 5-6; Anaheim City School District (1983) PERB Decision No. 364, pp. 26-27; Lake Elsinore School District (1988) PERB Decision No. 666, pp. 10, 16-18; Los Angeles Community College District (1987) PERB Decision No. 618.)

With the foregoing in mind, we turn to the facts of the instant case.

The Tahoe-Truckee Unified School District has nine schools located at various sites in Placer County. There are: three high schools - Tahoe-Truckee High (Truckee), North Tahoe High (Tahoe City), and Sierra High (Tahoe City); two intermediate schools - Sierra Mountain Middle (Truckee) and North Tahoe Intermediate (Tahoe City); and four elementary schools - Donner Trail Elementary (Soda Springs), Kings Beach Elementary (Kings Beach), Tahoe Lake Elementary (Tahoe City), and Truckee Elementary (Truckee).

For their printing needs[3] at the individual schools, including duplication and copying, the individual principals at the various schools would independently utilize six different sources depending on various ad hoc factors as to each need as it arose, including: the type of documents needed, the

[3]Such needs included: letterhead stationery, printed envelopes, business cards, course descriptions, "parents rights" summary, questionnaires, school newspapers, parents newsletters, honor certificates, student hall passes, etc.

physical size of the document, the printing style, special printing effects, the time when needed, and/or the quantity needed. Sources utilized were: (1) each school site had a regular copying machine, and some had "ditto" machines; (2) a large capacity copying machine was located in the administrative wing at the District office in Truckee; (3) the Placer County Office of Education in Auburn maintained purchasable supplies of various printed forms; (4) an offset press-copier with limited accessory equipment was located at the District office building in Truckee; (5) an offset press-copier with limited accessory equipment was located at North Tahoe High in Tahoe City;[4] and (6) private vendors, including Resort Graphics (Tahoe City), Tahoe Instant Press (Truckee), Tahoe World (Tahoe City), Tahoe Daily Tribune (South Lake Tahoe), and Print Technique (Tahoe City).

The copying and ditto machines at the various school sites, and the large capacity copying machine at the District office in Truckee, were operated by various administrative, classified and certificated employees at the individual sites. The offset press at the District office was operated by Renee Stone, an audio-visual repairman/offset press operator, a classified employee. The offset press at North Tahoe High was operated

[4]The North Tahoe High offset press was utilized for the printing needs of North Tahoe High and the adjacent North Tahoe Intermediate School.

by the students in the high school's industrial arts classes conducted by Donald Waymire, a certificated employee.

Certain items could not be done on the offset press at the District office due to the limited capabilities of the offset press itself. Such items included: business cards, school newspapers and/or documents exceeding 8 1/2 by 14 inches in size, specially embossed certificates, etc. Such printing services — along with, at times, other items that could be done on the offset press — were ordered as needed by the various schools from the assorted private vendors in Truckee, Tahoe City and South Lake Tahoe.

In August 1985, the District passed a resolution calling for the layoff of six custodian positions, two food services positions, and the audio-visual repairman/offset press operator position (occupied by Stone), as well as the reduction in hours of three food services positions. In bargaining the effects of the layoffs, the District and the classified unit representative (CSEA) agreed to reduce Stone's position to 20 hours a week in lieu of layoff. Stone's reduction in hours, along with additional layoffs of custodial and cafeteria positions, occurred in September 1985.

The District and CSEA made a supplemental agreement that, with respect to the layoffs and reductions in hours, the District would not contract out the work which had been performed by the laid-off or reduced-time classified employees, nor would such work be given to or done by administrative staff,

confidential employees, certificated employees, students or volunteers. This supplemental agreement became effective on or about January 22, 1986.

In order to monitor the above-mentioned supplemental agreement, CSEA was provided with copies of the District's warrants for goods and services. In April 1986, CSEA observed a $1,500 warrant having been paid in April to a private printer. The CSEA chapter president, Helen Gates, met with the District's negotiator, Robert Doyle (who was also the Sierra High principal and the acting assistant superintendent in April), and inquired as to what printing service was provided for that particular warrant. It was determined by Doyle that Tahoe-Truckee High School had contracted for the printing of course descriptions, and Doyle told Gates that he would investigate the matter. On April 17, 1986, Doyle sent Gates the following office memorandum:

TO: Helen Gates DATE: April 17, 1986

FROM: Robert Doyle SUBJECT: Contract Violation

On Thursday, April 17, I met with Tahoe Truckee High School Principal, Rick Miller, concerning the matters of contracting for printing services. My investigation determined the following:

1. We have always contracted with private printers for awards and certificates.

2. We have not contracted with private printers to do course descriptions. Therefore the printing order was

> in violation. Mr. Miller now understands that any contracted services may be in violation and he will check with me. Subsequently I will contact you. The matter of printing services has been put on the agenda for the April 24 Tahoe Truckee Administrators meeting. [Emphasis added.]

At the April 24 administrators' meeting, Assistant Superintendent Doyle discussed with the various school administrators the importance of the supplemental agreement. He instructed them that any items which had been printed in the past by the District should not be contracted out. District Superintendent Mulholland further emphasized to the school administrators that, since printing needs emanated from a variety of places and from various staff members, each principal was put on notice to be particularly observant with respect to the type of printing service requested.

On June 25, 1986, CSEA representative Niehaus wrote to Mulholland and indicated that CSEA was investigating the possibility that work previously and exclusively performed by the audio-visual repairman/offset press operator had been contracted out or transferred to other District employees. CSEA requested that the District supply, by July 11, 1986, any and all documents relating to printing services and audio-visual repair services since September 13, 1985, to enable CSEA to ascertain whether contract or EERA violations had occurred.

On July 1, 1986, Terre Krause became assistant superintendent (replacing Doyle), and District Superintendent Mulholland specifically appointed Krause as the administrator to supervise

the offset printing operations for Stone's position.

On July 9, 1986, the District gave CSEA photocopies of all the documents requested in the CSEA letter, along with a cover letter which set forth:

> Dear Mr. Niehaus:
>
> I am writing in response to your letter dated June 25, 1986. In your letter you requested copies of purchase orders, requisitions, billings and work orders for printing services and audio-visual repair services since September 13, 1985. Enclosed you will find photocopies of all documents requested.
>
> I will be most happy to discuss these documents with you or answer any questions you may have concerning them. If you wish to have a conference, please call Nancy at 587-3733 to set up an appointment. I would like to involve Bob Doyle since he previously was involved in this matter should you request a conference.
>
> Please give me a call if you have any questions.
>
> Sincerely,
>
> Terre D. Krause
> Assistant Superintendent

In checking Stone's work assignment, Krause found that Stone's printing work was backlogged because she was off during the summer recess. Krause discussed the printing backlog with Superintendent Mulholland and it was decided to bring Stone in to work extra hours, both before and after the start of the school year, until the backlog was cleared. Stone worked such extra hours during August and September of 1986.

Also, sometime near the end of August 1986, a questionable purchase order for outside printing came to Krause's attention.

At the very next administrators' meeting, Krause initiated a new practice whereby the individual school administrators would no longer contract directly with outside printers but, instead, would send all their printing requests to Krause's secretary. Krause's secretary would take such requests to Stone, who would determine if the requested items could be done on her offset equipment. If Stone advised that she could not print the items, they were then sent out to private vendors. If Stone could do the items, such items were then arranged in a prioritized order for Stone to follow. In November 1986, Krause altered this practice by personally handling the meetings, discussions and prioritizations with Stone himself.

The unfair practice charge filed by CSEA alleged that, since January 1986,[5] the District had violated subdivision (c) of EERA section 3543.5 by contracting out to private companies or transferring to nonunit employees work previously and exclusively performed by the audio-visual repairman/offset press operator, including eight specified printing incidents. Four of the incidents involved contracting out to private vendors and four involved work done on the offset press at North Tahoe High

[5]I agree with the majority that the 1985 printing incidents were not charged. Even if they had been charged, they occurred prior to the January 22, 1986 agreement. Moreover, the 1985 printing incidents may simply represent the existing practice prior to January 22, 1986, whereby items of bargaining unit printing work would be contracted out at various times to private vendors, both separately and in conjunction with nonbargaining unit work.

School. The eight were:

1. Honor Roll and Distinguished Scholar Certificates for Tahoe-Truckee High School (billed for $236.30 in March 1968);

2. Printed letterheads and envelopes for an unidentified school (ordered in January 1986 and billed for $122.83 in April 1986);

3. School Opinion Surveys for Sierra Mountain Middle School (ordered in January 1986 and billed for $85.52 in April 1986);

4. Course Description Handbook for Tahoe-Truckee High School (billed for $1,502 in April 1986);

5. Open House Newsletter for parents at North Tahoe High School, done in April 1986 by Waymire at North Tahoe High School;

6. Parents Directory for North Tahoe Intermediate School, done in April 1986 by Waymire at North Tahoe High School;

7. Printed letterheads and envelopes for North Tahoe High School, done in May 1986 by Waymire at North Tahoe High School; and

8. Course Description Handbook for North Tahoe High School, done in May 1986 by Waymire at North Tahoe High School.

Of the eight printing incidents alleged, the ALJ found, and the majority opinion affirms, that only one of the items—the course description handbook for Tahoe-Truckee High School—was an item that would have been bargaining unit work for Stone's position. The other printing items were found not to be bargaining unit work for Stone's position because the printing could not be done on Stone's offset press or the printing for two of the schools had always been done by Waymire's students

on the offset press at North Tahoe High School.[6]

In addition to the aforesaid course description handbook for Tahoe-Truckee High School, the ALJ also found, and the majority opinion affirms, two other post-January 1986 items (contained in the group of purchase orders and invoices the District supplied to CSEA), which were part of the bargaining unit work that could have been done by Stone. One item was 500 printed letterheads by a private vendor billed at $70.88 in February 1986 (which was combined with a nonbargaining unit job item of 500 business cards). The second item was 350 parent newsletters for Sierra Mountain Middle School by a private vendor and billed at $18.86 in March 1986.

The facts show that, after the January 22, 1986 agreement not to contract out custodial, cafeteria and printing bargaining unit work, and up to April 16, 1986, there were three separate and different items of printing work ordered and purchased from private vendors in violation of that agreement: the $70 printed letterheads item in February; the $19 parent newsletters item in March; and the $1,500 course description handbook item for Tahoe-Truckee High School ordered in January and billed in April. These contract violations occurred in the context of a large

[6]Neither the ALJ, in his proposed decision, nor the majority opinion deal with item 2—the printed letterheads and envelopes ordered on January 24, 1986 and billed in April 1986. While this item was ordered just two days after the January 22, 1986 agreement, it would still appear to be in violation of the agreement.

number of varied printing items being ordered by and done for the various schools. Printing services were being provided by multiple sources, including Stone's offset press, Waymire's North Tahoe High School offset press, and assorted private vendors. Some items were bargaining unit printing work, some items were nonbargaining unit printing work, and some items were a combination of the two.

It is difficult to perceive these individual and unrelated violations of the agreement, viewed separately or together, as having a generalized effect or continuing impact on the bargaining unit (or specifically on Stone's position[7]), such that one or all of the violations also constitute an unlawful unilateral change in policy by the District. Unlike the facts in the PERB and NLRB cases cited by the ALJ where contracting out was found to be a unilateral change in policy or practice, the District here did not contract with a private vendor or independent contractor to supply all or a specific part of its printing needs. Nor was there a contract with the respective private vendors who were involved in the three contract violations to continue to supply any or all other letterheads, course descriptions or parent newsletters items.

[7]While the three violations may have affected Stone's position to the extent that she did not have those three items to print, they did not have a generalized effect or continuing impact on her position.

Likewise, the circumstances surrounding the three violations do not suggest that the District was repudiating and changing the policy and, thus, would contract out all similar items in the future. When CSEA questioned the one large April warrant, the District promptly investigated the matter and acknowledged to CSEA that the printing item was, indeed, bargaining unit work and, as such, it was a violation of the agreement. The District then undertook steps to ensure there would be no further violations of the agreement. When CSEA later asked for copies of various documents back to September 1985, the District supplied them. The record in this case shows no violations of the agreement by the District subsequent to April 1986. The two other 1986 violations both occurred before April (one in February and one in March) and before CSEA made its April inquiry.

Applying Grant and Oak Grove to the facts of this case, there was no unlawful unilateral change in policy by the District.

I would dismiss the charge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. S-CE-1006, California School Employees Association and its Tahoe-Truckee Chapter No. 383 v. Tahoe-Truckee Unified School District, in which all parties had the right to participate, it has been found that the District violated Government Code section 3543.5(b) and (c).

As a result of this conduct, we have been ordered to post this Notice, and will abide by the following. We will:

1. CEASE AND DESIST FROM:

A. Unilaterally transferring work out of the classified bargaining unit by subcontracting to outside printers and electronic repair shops work formerly performed by a member of the unit.

B. Denying to the California School Employees Association and its Tahoe-Truckee Chapter No. 383 rights guaranteed by the Educational Employment Relations Act, including the right to represent its members.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

Reimburse Renee Stone for all wages and other benefits lost because of the District's decision to subcontract the printing of letterhead on February 14, 1986, course description handbook on February 23, 1986, and a parent newsletter on or about March 20, 1986. The amount due to Ms. Stone shall be augmented by interest at the rate of ten percent per annum dating from the first pay period after the subcontracting of each job.

Dated: _____ TAHOE-TRUCKEE UNIFIED SCHOOL DISTRICT

_____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED BY ANY MATERIAL.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION AND ITS TAHOE-TRUCKEE CHAPTER No. 383,	)	
Charging Party,	)	Unfair Practice Case No. S-CE-1006
v.	)	PROPOSED DECISION (2/26/87)
TAHOE-TRUCKEE UNIFIED SCHOOL DISTRICT,	)	
Respondent.	)	

Appearances: Christopher E. Niehaus, Field Representative, for the California School Employees Association and its Tahoe-Truckee Chapter No. 383; Douglas A. Lewis, Attorney for the Tahoe-Truckee Unified School District.

Before Ronald E. Blubaugh, Administrative Law Judge.

PROCEDURAL HISTORY

A school employee union here contends that following a reduction in the work force a public school employer subcontracted unit work. This action, the union argues, was a unilateral change in the prior practice and a failure to negotiate in good faith. The school employer responds that none of the work at issue was ever performed by any member of the unit and that its action was consistent with the previous use of private contractors.

The charge which commenced this action was filed on July 8, 1986, by the California School Employees Association and its Tahoe-Truckee Chapter No. 383 (CSEA). A complaint against the Tahoe-Truckee Unified School District (District),

incorporating the allegations in the charge, was issued August 19, 1986, by the Office of the General Counsel of the Public Employment Relations Board (PERB or Board).

The complaint alleges that the District violated Educational Employment Relations Act sections 3543.5(c) and, derivatively, (a) and (b),[1] by contracting out work formerly performed by a unit member in the position of audio-visual repairman/offset press operator. The complaint alleges that the subcontracting of this work violates the specific terms of a layoff agreement reached between the parties on January 22, 1986. The action is alleged to be a unilateral change in a negotiable matter and therefore a failure to negotiate in good faith. In its answer, the District denied

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[1]Unless otherwise indicated, all references are to the Government Code. The Educational Employment Relations Act (hereafter EERA) is found at section 3540 et seq. Although the complaint does not specify which unfair practice provisions the District is alleged to have violated, the charge and brief filed by the charging party list 3543.5(a), (b) and (c). In relevant part, section 3543.5 provides as follows:

> It shall be unlawful for a public school employer to:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

that it had contracted out any bargaining unit work. The District responded further that the type of work at issue "has never been treated as bargaining unit work by the parties."

A hearing was conducted in Truckee on December 2, 1986. With the filing of written briefs, the matter was submitted for decision on January 28, 1987.

FINDINGS OF FACT

The Tahoe-Truckee Unified School District is an employer under the EERA and, at all times relevant, CSEA has been the exclusive representative of a comprehensive unit of the District's classified employees. A collective bargaining agreement was in effect between the parties from July 1, 1983, through June 30, 1986, the period relevant to this action.

On August 14, 1985, the District Board of Trustees voted to abolish certain bargaining unit jobs, effective September 13, 1985. Among these was that of the audio-visual (AV) repairman/offset press operator (repairman/printer). The employee in this position operates the District print shop and audio-visual repair center.

In response to the staff reductions, CSEA on August 22, 1985, demanded that the District meet and negotiate regarding the effects of the planned layoffs. During the ensuing negotiations CSEA pressed the District for a commitment that the work formerly performed by the laid-off employees not be assumed by students, volunteers, remaining employees or

outside contractors. Rather, CSEA negotiators insisted, the work should simply go undone. Toward this end, CSEA secured an agreement from the District that for the duration of the layoffs there would be no speedup, no increased use of volunteers or students, and no contracting out of unit work. CSEA also convinced the District to convert the repairman/printer position to a 20-hour-per-week job rather than eliminate it entirely. On September 13, the day the reductions were to go into effect, the parties signed a tentative agreement containing the ban on contracting out along with other provisions relating to the effects of the layoff.

On October 9, 1985, the District school board voted to make still further reductions in bargaining unit jobs. The parties met again to negotiate about the effects of the additional layoff. On November 1, 1985, the parties agreed that their September settlement should apply also to the new round of layoffs. However, prior to school board ratification of the agreement, there was a change in both the composition of the school board and the District's top administrative staff. At a meeting on or about November 13, 1985, the restructured board declined to ratify the supplemental agreement.

One District concern was a tight restriction on subcontracting which was contained in the tentative agreement. The parties resumed negotiations and on January 22, 1986, they again reached agreement on the effects of layoff. The January

tentative agreement, which was accepted by the school board, contains the following provision regarding the subcontracting of unit work:

> There will be no contracting out of any unit work while any of the affected positions are reduced or are in a laid-off status unless such contracted work has been negotiated with the bargaining unit. This includes the use of any confidential, certificated and/or administrative employees.

This provision differs from that in the earlier tentative agreements in that it leaves open the possibility of subcontracting through further negotiations. The earlier language contained a flat ban on subcontracting.

In April of 1986, CSEA began to suspect that the District was subcontracting the printing of some materials. In particular, CSEA believed that the District had improperly subcontracted the printing of certain awards for honor students and a booklet of course descriptions. CSEA Chapter President Helen Gates confronted District administrators with what she believed to be evidence of subcontracted printing. In response, District negotiator Robert Doyle acknowledged on April 17, that Tahoe-Truckee High School improperly subcontracted the printing of a course description handbook. He said he had reviewed the matter with the school principal and improper subcontracting would be avoided in the future. Regarding CSEA's challenge to the printing of award certificates, Mr. Doyle responded that the District had always contracted with private printers for such services.

Despite the District's assurances, CSEA continued to suspect that printing and audio-visual repair work were being subcontracted by the District. On June 25, 1986, CSEA requested the District to supply copies of its purchase orders, requisitions, billings and repair orders for printing services and audio-visual repair since September 30, 1985. On July 9, 1986, the District turned over the requested information.

The invoices and purchase orders show that the District made a series of purchases from local printers. Letterheads were purchased on the following dates: 1,000 on or about September 19, 1985,[2] 500 on or about October 10, 1985,[3] 1,000 plus 1,000 envelops on or about November 1, 1985,[4] 500 on or about November 9, 1985,[5] 500 on or about February 14, 1986.[6] Renee Stone, who held the position of AV repairman/printer throughout the relevant period, testified

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[2]The dates are not legible on many exhibits. On some exhibits, there is more than one date. The dates referred to throughout the remainder of this Proposed Decision represent my best effort to affix a date for each of the contested jobs. In order to avoid confusion in the remedy portion of this decision, in the first reference I will identify by applicable exhibit number each of the allegedly subcontracted jobs. In this instance, the reference is to Joint Exhibit 10, item 0.

[3]Joint Exhibit 10, item 1.

[4]Joint Exhibit 10, item 6.

[5]Joint Exhibit 10, item 9.

[6]Joint Exhibit 10, item 14.

without contradiction that the printing of letterheads and envelopes is work that she has traditionally performed.

Outside firms printed 100 index cards on or about October 10, 1985,[7] 300 forms on or about October 17, 1985,[8] 500 forms on or about November 14, 1985,[9] 1,000 course description handbooks on or about February 23, 1986,[10] and 350 newsletters for parents on or about March 20, 1986.[11] Ms. Stone credibly testified that she previously had printed index cards, forms, course description handbooks and parent newsletters as part of her regular work.

The District also contracted for the printing of student certificates and copies of the school newspapers. Eight hundred honor certificates and 200 distinguished scholar certificates were printed on or about November 1, 1985.[12] Outside firms printed copies of the Tahoe-Truckee High School newspaper on or about October 18, 1985,[13]

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[7]Joint Exhibit 10, item 1.

[8]Id.

[9]Joint Exhibit 10, item 7.

[10]Joint Exhibit 10, item 16

[11]Joint Exhibit 10, item 17

[12]Joint Exhibit 10, item 6.

[13]Joint Exhibit 10, item 1.

December 20, 1985,[14] February 23, 1986,[15] and February 28, 1986,.[16] Copies of the North Tahoe High School newspaper were printed on or about October 3, 1985,[17] October 11, 1985,[18] and December 6, 1985.[19] Ms. Stone testified that she previously had printed honor certificates for students, but she did not have equipment to print certificates in the decorative manner purchased by the District in November of 1985. Similarly, she testified, she had printed student newspapers for the two high schools. However, at the time she printed the papers they were in a different format from those printed in the fall and winter of the 1985-86 school year. She testified that there was no equipment in the District print shop capable of printing student newspapers in a format like those contracted out in 1985-86.

There were two other projects of a type that Ms. Stone had never done and had no equipment capable of printing. These were the printing of 250 business cards on or about September 19, 1985,[20] 500 business cards on or about

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[14]Joint Exhibit 10, item 10.

[15]Joint Exhibit 10, item 16.

[16]Joint Exhibit 10, item 15.

[17]Joint Exhibit 10, item 3.

[18]Joint Exhibit 10, item 8.

[19]Joint Exhibit 10, item 12.

[20]Joint Exhibit 10, item 0

February 14, 1986,[21] and 350 opinion polls on or about January 31, 1986.[22]

Finally, on or about June 3, 1986,[23] the District purchased 3,300 copies of a parent rights form from the Placer County Office of Education. Ms. Stone testified that she could have printed the form on the District's equipment. Nevertheless, Michael Bowdish, the District Coordinator of Special Education, credibly testified that he had purchased the forms from Placer County since the 1980-81 school year.

It was the past practice that the District could contract out any printing work which was beyond the capability of the District's equipment. The District's print shop contains an offset press capable of printing documents up to 8 and 1/2 by 14 inches, a copier, a collator, a stapler, a shaker, a folding machine and a cutter. The shop uses only paper masters in printing because it is not equipped with either a camera or plate making equipment.

There appears to have been no restriction precluding the reassignment of printing tasks to outside contractors in order to improve quality and appearance. Over the years, student newspapers have been printed both at outside shops and within

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[21]Joint Exhibit 10, item 14

[22]Joint Exhibit 10, item 13

[23]Joint Exhibit 10, item 19.

the District, depending upon the desires of the students and high school administrators. District Superintendent Francis Mulholland credibly testified that as long ago as the 1978-79 school year when he was principal at North Tahoe High School, the student newspaper was printed at an outside shop. For a time, the format was changed and the paper returned to inside printing. However, he continued, beginning with the 1985-86 school year, a journalism class was reinstituted at the school, and the printing of the paper moved outside the District.

In addition to its concerns that the District was sub-contracting work to private printers, CSEA also feared that the District was diverting work to students in a graphic arts class at North Tahoe High School. The high school graphic arts shop, which is better equipped than the District's print shop, contains an offset press, a paper cutter, a copy machine, a metal master machine, a camera, platten presses, an embossing machine, a thermo-fax machine, a paper master machine and a tracing table.

One section of graphic arts is taught each day to students at the school. Individual students also enroll in graphic arts through independent study. The class, which has been in existence since 1979 or earlier, is a production-oriented course. Students learn how to print by operating the machines and producing printed materials. Among the items listed for

student production in the 1979 course description is "office forms."

Donald Waymire, the graphic arts teacher, credibly-testified that students in his class have printed forms for North Tahoe High School and the North Tahoe Intermediate School for the eight years that he has instructed the course. He said that the students have not printed and do not currently print forms and materials for the District office.

CSEA introduced evidence that during the last year students in the class had printed a course description handbook, hall passes, letterheads for the high school, an open house announcement, a notice to parents and a school newsletter. However, Mr. Waymire credibly testified that students in his class had produced similar documents for the entire period that he has taught the class.

Mr. Waymire testified that graphic arts students undertook no new types of jobs in 1985 or thereafter, with the exception of some additional copy work for teachers. The work for teachers was redirected to the graphic arts students by the school principal, Wayne Scholl, in order to relieve the burden on the school copy machine. The work for teachers had never been done in the District print shop and the redirection from school copier to graphic arts class was a redirection from one non-unit source to another non-unit source.

The District's practice regarding the repair of

audio-visual equipment is similar to its practice regarding printing. Work within the capacity of the District's equipment and the competence of the AV repairman/printer historically has been performed within the District. Work beyond the capacity of the equipment and the technical competence of the staff has historically been sent outside. The audio-visual repair center is equipped with an oscilloscope, an electroscope and a voltage meter. The center also has battery testers and various types of hand tools.

Ms. Stone credibly testified that she can fix motion picture projectors, can trouble-shoot problems with computers and make minor repairs and can fix some problems with television sets. The practice has been that audio-visual equipment would be brought to the District shop for evaluation. Ms. Stone would make repairs within the limits of her equipment and personal knowledge. If she was unable to make the repairs, she would send the equipment out to private shops.

Five repair jobs were sent out to private firms following Ms. Stone's reduction in hours. On or about October 25, 1985,[24] the District sent a computer out for repair without first bringing it to the AV repair shop for evaluation. The problem with the computer turned out to be an

[24]Joint Exhibit 10, item 4.

unplugged keyboard. Ms. Stone credibly testified that had the computer first been brought to her shop for evaluation, she would have discovered this problem.

On or about November 5, 1985,[25] two ditto machines were sub-contracted to a private shop for repair. Ms. Stone credibly testified that she previously had performed such repairs on District equipment. On or about November 16, 1985,[26] the District sent out for repair a television set which Ms. Stone could not repair because she did not have sufficient time. She credibly testified that she has the capability to perform such repairs on television sets.

On or about November 18, 1985,[27] the District sent out for testing a computer which had been idle for some five months. No problems were discovered with the computer. Ms. Stone testified that she would not have been able to test the machine for the same amount of time as the private company because her workload was too heavy to permit it. There is no evidence that she lacked the technical competence to perform the tests. Finally, on or about May 27, 1986,[28] the District sent out a computer to a private contractor for the repair of a

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[25]Joint Exhibit 10, item 2.

[26]Joint Exhibit 10, item 11.

[27]Joint Exhibit 10, item 5.

[28]Joint Exhibit 10, item 18.

drive gear. Ms. Stone testified that she was not capable of performing such a repair.

In response to CSEA's complaints about the contracting out of unit work, the District instituted a series of steps designed to restrict the use of outside printers. Beginning in September 1986, all requests for outside printing must be cleared through the office of the assistant superintendent. In addition, a log of printing requests is maintained in the print shop. Whenever a backlog develops, Ms. Stone is called in to work additional hours until the backlog is cleared. In the fall of 1986 Ms. Stone was assigned to work extra hours for four weeks in order to clear a backlog. The District policy now prohibits the contracting out of printing except where District equipment is not capable of performing the desired job.

LEGAL ISSUE

Did the Tahoe-Truckee Unified School District subcontract unit work and thereby make a unilateral change in working conditions in violation of EERA sections 3543.5(c) and, derivatively, (a) and (b)?

CONCLUSIONS OF LAW

It is well settled that an employer that makes a pre-impasse unilateral change affecting an established policy within the scope of representation violates its duty to meet and negotiate in good faith. NLRB v. Katz (1962) 369 US 736 [50 LLRM 2177]. Such unilateral changes are inherently

destructive of employee rights and are a failure per se of the duty to negotiate in good faith. See generally, Davis Unified School District et al. (1980) PERB Decision No. 116, San Francisco Community College District (1979) PERB Decision No. 105, State of California (Dept, of Transportation) (1983) PERB Decision No. 361-S.

Established policy may be reflected in a collective bargaining agreement, Grant Joint Union High School District (1982) PERB Decision No. 196, or where the agreement is vague or ambiguous, it may be determined by an examination of bargaining history, Colusa Unified School District (1983) PERB Decision Nos. 296 and 296(a), or the past practice, Rio Hondo Community College District (1982) PERB Decision No. 279, Pajaro Valley Unified School District (1978) PERB Decision No. 51.

Where the purported violation involves the alleged repudiation of a contract clause, the exclusive representative must prove: (1) that the employer breached or otherwise altered the parties' written agreement; and (2) that the breach had "a generalized effect or continuing impact upon the terms and conditions of employment of bargaining unit members." Grant Joint Union High School District, supra, PERB Decision No. 196.

At issue here is the alleged subcontracting of unit work. The PERB has several times held that the subcontracting of unit work is a matter within the EERA scope of

representation.[29] Arcohe Union School District (1983) PERB Decision No. 360; Oakland Unified School District (1983) PERB Decision No. 367. Cf. State of California (Dept, of Personnel Administration) (1986) PERB Decision 574-S. Where, without negotiations, an employer changes "the quality and kind" of its past subcontracting practice, it will be found guilty of failing to negotiate in good faith. Oakland Unified School District, supra. See also, Clevenger Logging Inc. (1975) 220 NLRB 768 [90 LLRM 1726] and Shell Oil Company (1967) 166 NLRB 1064 [65 LLRM 1713]. But, if the employer acts consistently with established practice, it makes no unlawful unilateral change. See generally, Placer Hills Union School District (1982) PERB Decision No. 262.

CSEA acknowledges that, because of limitations on District equipment, there has been a practice of contracting out certain

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[29]The scope of representation under the EERA is set forth at section 3543.2 which, in relevant part, provides as follows:

> (a) The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment. "Terms and conditions of employment" mean health and welfare benefits as defined by Section 53200, leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security pursuant to Section 3546, procedures for processing grievances pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8, and the layoff of probationary certificated school district employees, pursuant to Section 44959.5 of the Education, Code. . . .

printing services and audio-visual equipment repair. CSEA further acknowledges that there has been a practice of student-performed printing in the District's high school graphic arts class. However, CSEA continues, the past practice was changed by an agreement negotiated between the parties in late 1985 and early 1986. The effect of the agreement, CSEA contends, was to change the past practice by creating a prohibition on all contracting out of work prior to negotiations. The District breached this agreement, CSEA argues, when it not only continued to send out work but increased the amount following the reduction in hours of the audio-visual repairman/printer.

The District argues that work beyond the capacity of the District's equipment is not unit work and has never been treated as unit work by the parties. There is no evidence in the negotiating history, the District argues, to show any intent to recapture work previously done outside. The only obvious intent was to prevent any additional work from going outside. Similarly, the District argues, there is no evidence that work completed in the graphic arts class was ever considered unit work by the parties. The District examines each example of work allegedly transferred out of the unit and argues that none of this work differs in any way from the past practice.

The key question, as is illustrated by the opposing

arguments, is what is unit work. The supplemental agreement clearly prohibits the sub-contracting of unit work without prior negotiations, but it offers no definition of unit work. In the absence of a contractual definition, the only reliable source for determining the nature of unit work is what the parties have themselves done in the past.

It is essentially uncontested that in the past the AV repairman/printer performed all of the printing and electronic repair that was within the limits of her equipment and her personal skills. Printing and audio/visual repairs beyond the capacity of her equipment or her personal skills were contracted out. Students in the North Tahoe High School graphic arts class did printing that was often similar to that performed in the District print shop. However, the students limited the range of their work to the needs of their own school and a nearby intermediate school.

CSEA argues that it was the intent of the January 22, 1986 agreement to change this past practice. In effect, CSEA argues that the purpose of the agreement was to expand the extent of unit work to cover all jobs that were formerly sent out. No evidence of such intent can be found in the testimony of any witness. The clear purpose of the supplemental agreement, as is evidenced both from its words and from the testimony of those who negotiated it, was to prevent work traditionally done by the audio-visual repairman/offset printer from being

transferred outside the unit. The purpose of the agreement was to ensure that the amount of work was not diminished, not to institute an expansion of that work.

With this understanding of the past practice, it is apparent that certain of the work performed by outside printers and electronic repair shops marked a change in the past practice. The printing of letterheads on or about September 19, 1985, October 10, 1985, November 1, 1985, November 9, 1985, and February 14, 1986, was work traditionally performed in the District print shop. Similarly, the printing of index cards on or about October 10, 1985, of forms on or about October 17, 1985, and November 14, 1985, of a course description handbook on or about February 23, 1986, and of a parent newsletter on or about March 20, 1986, was all work that traditionally would have been performed in the District print shop. The District sent this work out to the private printers without prior notice or negotiations with CSEA. The District also changed its past practice without prior notice when it arranged for repairs to audio-visual equipment on or about October 25, 1985, November 5, 1985, November 16, 1985, and November 18, 1985.

Because the District acted unilaterally when it changed its past practice and subcontracted certain work formerly performed by the AV repairman/offset printer, it failed to negotiate in good faith in violation of EERA section 3543.5(c). A unilateral failure to negotiate in good faith also is a

derivative violation of EERA sections 3543.5(a) and (b). San Francisco Community College District (1979) PERB Decision No. 105.

There was no change in past practice when the District sent out for printing: student honor certificates on or about November 1, 1985; Tahoe-Truckee High School newspapers on or about October 18, 1985, December 20, 1985, February 23, 1986 and February 28, 1986; North Tahoe High School newspapers on or about October 3, 1985, October 11, 1985 and December 6, 1985; the printing of business cards on or about September 19, 1985, and February 14, 1986; the printing of an opinion poll on or about January 31, 1986, and the ordering of a parent rights form on or about June 6, 1986. Nor did the District make any change in its past practice when it sent out to a private electronics shop a computer repair job on or about May 27, 1986. All of these jobs are beyond the capacity of District equipment and they represent no expansion of the "quality and kind" of the District's past subcontracting practice.

REMEDY

The Charging Party seeks an order that the District be required to compensate Renee Stone for lost wages, benefits and lost seniority hours due to the unlawful contracting out of unit work. In addition, CSEA seeks a cease-and-desist order and the posting of a notice.

The PERB in sub-section 3541.5(c) is given:

> . . . the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without backpay, as will effectuate the policies of this chapter.

The ordinary remedy in a unilateral change case is the return to the status quo ante. Where the change has resulted in a loss of compensation to one or more members of the bargaining unit, the ordinary remedy is that those employees be made whole. Here, Renee Stone lost wages when the printing and audio-visual repair work were subcontracted. She must be reimbursed for the amount of time she would have worked had she performed each of the projects found to have been improperly subcontracted. The compensation should be calculated by applying her appropriate hourly pay rate to the number of hours Ms. Stone would have worked had she been permitted to print the letterheads, index cards, forms, course description handbook, and parent newsletter improperly subcontracted to an outside printer and had she been permitted to service the computers, ditto machines, and television which were improperly sent to outside repair shops. In addition to salary for lost work time, she shall also be compensated for any other lost benefits or lost seniority due to this subcontracting of unit work. The amount due to Ms. Stone is to be augmented by interest at

the rate of ten percent per annum dating from the first pay-period after each of the subcontracted projects.

It is further appropriate that the District be directed to cease and desist from its unfair practices and to post a notice incorporating the terms of this order. Posting of such a notice, signed by an authorized agent of the District will provide employees with notice that the District has acted in an unlawful manner, is being required to cease and desist from this activity, and will comply with the order. It effectuates the purposes of the EERA that employees be informed of the resolution of the controversy and the District's readiness to comply with the ordered remedy. Davis Unified School District et al, supra. PERB Decision No. 116; see also Placerville Union School District (1978) PERB Decision No. 69.[30]

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions

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[30]It is noted that some of the incidents of subcontracting occurred prior to the six-month period of limitations set out in section 3541.5(a) (1). However, the statute of limitations has not been asserted by the employer at any point in this proceeding. A defense based on the statute of limitations is waived if not timely asserted. Walnut Valley Unified School District (1983) PERB Decision No. 289. Moreover, the statute of limitations does not begin to run until the charging party had actual or constructive knowledge of the conduct at issue. Victor Valley Community College District (1986) PERB Decision No. 570. Here, CSEA's first suspicions that the District might be subcontracting unit work were not aroused until April of 1986. The charge was filed well within six months of those first suspicions.

of law, and the entire record of this case, it is found that the Tahoe-Truckee Unified School District violated section 3543.5(c) and, derivatively, (a) and (b) of the Educational Employment Relations Act. Pursuant to section 3541.5(c) of the Government Code, it is hereby ORDERED that the District, its governing board and its representatives shall:

1. CEASE-AND-DESIST FROM:

Making unilateral changes in the past practice by subcontracting to outside printers and electronic repair shops work formerly performed by a member of the bargaining unit.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

A. Within thirty (30) workdays of service of a final decision in this matter, reimburse Renee Stone for all wages and other benefits lost because of the District's decision to subcontract the printing of: letterheads on or about September 19, 1985, October 10, 1985, November 1, 1985, November 9, 1985, and February 14, 1986; index cards on or about October 10, 1985; forms on or about October 17, 1985 and November 14, 1985; a course description handbook on or about February 23, 1986; a parent newsletter on or about March 20, 1986, and the repair of audio-visual equipment on or about October 25, 1985, November 5, 1985, November 16, 1985, and November 18, 1985. The amount due to Ms. Stone shall be augmented by interest at the rate of ten percent, per annum

dating from the first pay period after the subcontracting of each job.

B. Within ten (10) workdays of service of a final decision in this matter, post at all work locations where notices to classified employees are customarily posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that the District will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered by any other material.

C. Upon issuance of a final decision, make written notification of the actions taken to comply with the Order to the Sacramento Regional Director of the Public Employment Relations Board in accord with the director's instructions.

All other allegations in unfair practice charge No. S-CE-1006 and companion complaint are hereby DISMISSED.

Pursuant to California Administrative Code, Title 8, Part III, Section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself at the headquarters office in Sacramento within twenty days of service of this Decision. In accordance with PERB Regulations, the statement of exceptions should identify by page citation or exhibit the portions of the record, if any, relied upon for such exceptions. See

California Administrative Code, Title 8, Part III, section 32300. A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing, ". . .or when sent by telegraph or certified or Express United States Mail, postmarked not later than the last day set for filing . . ." See California Administrative Code, Title 8, Part III, section 32135. Code of Civil Procedures section 1013 shall apply. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. See California Administrative Code, Title 8, Part III, sections 32300, 32305, and 32140.

Dated: February 26, 1987

RONALD E. BLUBAUGH
Administrative Law Judge